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Supreme Court, U.S.
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No. 96-1041

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD D. McVICAR, WARDEN,
Petitioner,

v.

LEE OTIS GRIFFIN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I.

BECAUSE AN ARGUMENT GROUNDED IN § 2254(D) GOES TO A LIMITATION ON THE FEDERAL COURTS' POWER TO ADJUDICATE, IT CANNOT BE WAIVED BY THE STATE

The central strategy of respondent's brief in opposition to the petition for certiorari is to disavow the significance of footnote two in this Court's decision in *Sumner v. Mata*, 449 U.S. 539 (1981), offering the superficial explanation for the majority's refusal in that case to find that the State abandoned its right to rely on § 2254(d), simply that the "[Supreme] Court had the benefit of the full briefing and argument from the parties on the § 2254(d) argument."[1] (Opposition, p. 7). Moreover, attempting to ignore

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[1] Nor can Griffin successfully distinguish this case from *Sumner v. Mata* by arguing that in *Sumner*, the § 2254(d) issue, although not raised in the court of appeals, was raised in the district court, while here, "[u]ntil the Court of Appeals denied rehearing, the State never briefed the matter of AEDPA's applicability to this case." (Opposition, p. 6). From the time the AEDPA was passed on April 24, 1996, until the Court of Appeals decided *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *cert. granted in part*, 136 L.Ed.2d 643 (1997), on September 12, 1996, the weight of authority from other circuits indicated that the Act was not to apply to pending cases. The Court of Appeals noted as much in *Lindh*: "To leave the ensuing judgment in force—and to leave all of the rules governing primary conduct intact—is not 'retroactive' in the sense *Landgraf* uses that term, and the amended § 2254(d) is therefore presumptively applicable. We respectfully disagree with the contrary conclusions of *Edens v. Hannigan*, 87 F.3d 1109, 1111 n. 1 (10th Cir. 1996), and *Boria v. Keane*, 90 F.3d 36 (2d Cir. 1996)." 96 F.3d at 865. Griffin also overlooks the fact that on the very day the State moved to file *Lindh* as additional authority under Circuit Rule 28(j), 11 days after it was decided, the Court of Appeals entered an order denying rehearing and finding that the State had waived its right to rely on the Act. In other

(Footnote continued on following page)

the plain meaning of then-Justice Rehnquist's language in footnote two,[2] Griffin fallaciously reasons that no conflict between *Sumner* and the case at bar exists because "the passage of AEDPA [Antiterrorism and Effective Death Penalty Act of 1996], and the Court of Appeals' refusal to apply it retroactively in this case, did not remove subject matter jurisdiction from the Court of Appeals or from any other federal court." (Opposition, pp. 5-6).

Unquestionably, footnote two cannot be construed to mean that § 2254(d) removes subject matter jurisdiction from a federal court. Then-Justice Rehnquist was merely explaining that an argument grounded in § 2254(d) goes to a limitation on the federal courts' power to adjudicate and, thus, despite the State having failed to raise it, it can be raised at any time. *See* Fed. R. Civ. P. 12(h)(3); *see also* Larry W. Yackle, *Symposium: State Prisoner Use of Federal Habeas Corpus Procedures: The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393, 416-17 (1983).

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[1] *continued*
words, the State's motion and the Court's order literally "crossed in the mail." Although Judge Flaum would have granted the State's motion to vacate the portion of the Court's order finding waiver, which the State filed when it became aware that its motion to file additional authority and the Court's order had crossed in the mail, the other two judges on the panel voted to deny it.

[2] It should also be noted that respondent's assertion that footnote 2 in *Sumner* has never been cited as authority is incorrect. As one example, Judge Higginbotham from the Court of Appeals for the Fifth Circuit relied on footnote 2 in *Terrell v. Maggio*, 693 F.2d 591, 593 n. 1 (5th Cir. 1982), in addressing a § 2254(d) issue which had never been raised by the State.

The principle that Congress has placed limitations on the federal courts' authority to grant habeas corpus relief to state prisoners has just recently been reaffirmed. In *Felker v. Turpin*, 116 S.Ct. 2333 (1996), although concluding that the Act does not deprive it of jurisdiction to entertain original habeas petitions, this Court found that:

> Our *authority* to grant habeas relief to state prisoners is *limited* by § 2254, which specifies the conditions under which such relief may be granted to "a person in custody pursuant to the judgment of a State court. [citation omitted]. Several sections of the Act impose new requirements for the granting of relief under this section, and they therefore inform our authority to grant such relief as well.

116 S.Ct. at 2339 (emphasis added).

Amended § 2254(d)(1) undeniably places a limitation on federal courts' power to grant collateral relief to a state prisoner. In the Court of Appeals' own words in *Lindh*:

> A conflict between decisions of the Seventh Circuit and the Supreme Court of Wisconsin would not *authorize* issuance of a writ under §2254(d)(1). State courts must knuckle under to decisions of the Supreme Court, but not of this court.

96 F.3d at 869 (emphasis added). The Court of Appeals continued:

> We must ensure that the Supreme Court of Wisconsin adheres to legal principles articulated by the Supreme Court of the United States. But when the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts—when it is, in the standard phrase, a "mixed question of law and fact"—§ 2254(d)(1) *restricts* the grant of collateral relief to cases in which the state's decision reflects "an unreasonable application of" the law.

Id. at 870 (emphasis added).

Although the Court of Appeals expressly recognized in *Lindh* that amended § 2254(d) places limititations a federal court's power to adjudicate, it nonetheless found that the State could abandon its right to rely on it. 96 F.3d at 865. This erroneous interpretation of the law must be corrected.

II.

THE STATE COURT DECISION BELOW WAS NOT BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS

Griffin argues that even if this Court upholds the holding in *Lindh* that the AEDPA does in fact apply to cases pending on the date of enactment, but further finds that the State cannot abandon its right to rely on amended § 2254(d) because it restricts federal courts' power to adjudicate, it is unnecessary to remand this cause because Griffin "will still prevail under amended § 2254(d)(2) because the State Court decision, *People v. Griffin*, 109 Ill.2d 293, 487 N.E.2d 599 (1985), is based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." (Opposition, p. 9). Specifically, he asserts that the Illinois Supreme Court's determination of the facts was unreasonable because it omitted from the "calculus" the fact that trial counsel filed motions to sever his clients' cases before trial. This, according to Griffin, demonstrates that "Goldenhersh [his counsel] knew Mr. Griffin [sic] admissions about being at the scene contradicted the alibi defense Goldenhersh expected to mount [and] Goldenhersh did not want these admissions to adversely affect the fortunes of his other client, Jimmy Smith." (Opposition, p. 10).

Because Griffin himself has put this particular spin on trial counsel's filing of motions to sever on behalf of both

of his clients does not mean that the Illinois Supreme Court's failure to engage in a similar leap in inference amounts to an unreasonable determination of the facts. There is no indication from the severance hearing transcript, (excerpt attached hereto in the appendix), that trial counsel moved for a severance because he knew that Griffin had made statements indicating that he had been at the murder scene only as an innocent bystander, and that such statements would contradict Jimmy Smith's alibi defense. On the contrary, the only necessary conclusions to be drawn from the transcript is that counsel was worried about the effect Smith's substantial criminal record might have on Griffin, (App. 6-7), and about certain statements against interest which Griffin allegedly made to police which might in turn affect Smith. For example, trial counsel indicated to the trial judge that the prosecution allegedly had evidence of Griffin making a phone call while at the police station telling a friend to report his car stolen.[3] (App. 6). Another example counsel cited was the alleged statement of a police officer indicating that he had told Griffin, "Boy, you're sure in a lot of trouble," and Griffin responded, "I know it." (App. 6). Counsel further indicated, without elaborating, that "[t]here are a few other examples like that, not direct, not relating directly to the alleged shooting, but a [sic] very very damaging, devastating evidence, perhaps as to the one defendant, and clearly inadmissible as to the other." (App. 6). Clearly, this last ambiguous statement need not have compelled the Illinois Supreme Court to conclude that trial counsel knew Griffin might possibly have a viable innocent bystander defense, the raising of which would be out of the question if he desired to continue to represent both defendants.

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[3] Griffin's car was identified as having been used in connection with the crime.

Moreover, even if it could be concluded that counsel was made aware from sources other than Griffin that Griffin told his first lawyer he had been an innocent bystander at the crime scene, yet continued to maintain to counsel now that he and Smith had a joint alibi,[4] that certainly would not mean that a federal court would be authorized to grant habeas relief based on such a showing. In order to secure a writ, Griffin must show that, applying *Cuyler v. Sullivan*, 446 U.S. 335 (1980) to the facts of his case, an actual conflict of interest adversely affected his trial counsel's performance. As Judge Flaum concluded in his dissenting opinion in the case below, that Mr. Griffin cannot do.

CONCLUSION

For the reasons set out above and those set forth in the petition for a writ of certiorari, the Court should grant the petition to review the decision of the United States Court of Appeals.

Respectfully submitted,

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[4] The majority in the case at bar in fact presumed that.

APPENDIX

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT OF ILLINOIS
ST. CLAIR COUNTY

THE PEOPLE OF THE STATE OF ILLINOIS	)	
vs.	)	No. 81-CF-116
LEE OTIS GRIFFIN & JIMMY LEE SMITH	)	

REPORT OF PROCEEDINGS

Before the HON. JOHN J. HOBAN

MOTIONS

May 29, 1981

APPEARANCES:

Mr. John Baricevic
State's Attorney

On Behalf of the People;

Mr. Marvin Goldenhersh
Private Counsel

On behalf of the Defendants.

Debra M. Musielak, CSR, CM
Official Court Reporter

THE COURT: Which motion do you wish to take up first, Mr. Goldenhersh?

MR. GOLDENHERSH: Motion for severance in behalf, first in behalf of Lee Griffin.

THE COURT: All right.

MR. GOLDENHERSH: Do you want me to stand during this presentation, your Honor?

THE COURT: No, as old as you are, you can sit down.

MR. GOLDENHERSH: Your Honor, there are two main reasons for this severance. The one thing, this defendant Lee Griffin has no record whatsoever, to my knowledge anyway, unless—that's one of the things I haven't been furnished on Discovery, Hoover reports, but I don't believe that Lee Griffin has any record.

THE COURT: Well, let's clear that up right now. Has Lee Griffin any kind of a record?

MR. BARICEVIC: Judge, I suspect he does, and I will have to—

THE COURT: Well, if he does, he should have—

MR. GOLDENHERSH: I don't think he does, your Honor. And I think it is important to know one way or the other.

THE COURT: That's right. You are entitled to know.

MR. GOLDENHERSH: While you are looking, I don't know, we don't have Hoover reports on other State witnesses, in fact on the primarily State witness, who is this fellow Kellick, whose case they are continuing so he won't have another conviction, which I question the propriety of that.

MR. BARICEVIC: Judge, I'm prepared to answer that, but I think we ought to do one motion at a time.

MR. GOLDENHERSH: I thought I'd get in a few licks.

MR. BARICEVIC: Judge, apparently we don't have any record on—wait a minute. Which guy are we on?

MR. GOLDENHERSH: We are on a motion of severance for Lee Griffin.

MR. BARICEVIC: Okay Judge. We do—we have received a Department of Law Enforcement sheet on Lee Otis Griffin, which I don't see the date on it. At any arrest, it shows five arrests and two convictions, both misdemeanors.

THE COURT: Well, no criminal record.

MR. GOLDENHERSH: No criminal record, then I was right about that. Now, on the other hand, the co-defendant, Jimmy Smith, I understand again, I haven't received the Discovery, has a substantial record, just in fact I know he has been in the penitentiary for almost the last 10 or 11 years, and very serious question, it is doubtful that he would testify at all. In trying these two people together in the same trial, would put a no record person with a person with a substantial record. There is no charge of any conspiracy here, and I feel that it is a disadvantage, and detriment to Griffin that there would be no way to overcome.

In addition to that, we have asked the State to specifically set out to us, and I think Rule 412 would require this under the circumstances. Rule 412 requires that they give us their witnesses, not that they give us a bunch of police reports, many of which are not too coherent, and others of which are not even legible. And we have alleged in the motion that there are suggestions in those police reports that admissions against interest and so forth. And of course admission against interests by one defendant, you can cover that with an Instruction. You can tell the jury that they shouldn't be held against the other defendant. But as a practical matter, that is of very very little curative effect of this extreme detriment and unfairness that's imposed upon a co-defendant in a situation like that. And I believe that for those two main reasons, the fact that the one fellow has no record at all, and the other one has a substantial record, and the fact that there are

those complications with regard to admissions, that it would be extremely unfair for those people to be tried together. Now, so that the Court could evaluate the extent of those admissions, we have asked, in fact I talked to Charlie Hamilton about it, and it was my impression that he would furnish it, that he would put before the Court exactly what admissions we are talking about. If it is necessary to weigh the extent of the admissions, and how damaging they would be.

THE COURT: If they are merely admissions, they can be cured by an Instruction, and we cure them every day by Instruction. I know it is not the ideal method of taking care of such a situation, I know that the mind of a juror is not like a blackboard where you can erase from it something that has been said, but I think generally our jurors today are sophisticated enough that they will follow the Instructions. We had the same situation yesterday where there were statements made, admissions by each party, and they were stricken, deleted, the names—they were written admissions, and the names of the co-defendants were deleted from each others admissions. And we gave them an Instruction. So I would deny it on that grounds. I think it can be cured. They will be properly instructed to the effect that any admissions against interest pertain only to the defendant who made the admissions against interest, and not to anyone else, and can't be considered against anyone else.

MR. GOLDENHERSH: Well your Honor, let me—may I interrupt for just one second. This is an alibi defense, and of course it can't be possibly cured in that kind of a situation. I mean if they are going to disbelieve an alibi of one defendant, because of such admissions, there is no way in the world that can be cured as to the other defendant.

THE COURT: Well I don't know how one—

MR. GOLDENHERSH: They were either in this together, or they weren't.

THE COURT: Well, we are not going to permit into evidence any admission by one defendant that he and the other defendant—in other words, any admission by Lee Otis Griffin that he and Jimmy Smith were in there together. We are not going to permit him to say that.

MR. GOLDENHERSH: Well, what I'm saying is though that clearly is hearsay. It would be strictly hearsay as to the co-defendant. There is no question about that.

THE COURT: That's right.

MR. GOLDENHERSH: Whether it is an admission against interest, against another defendant. Now what I'm saying is in an alibi defense, it is devastating. There is no way you can cure it. It is—maybe in some situations where it wouldn't, where it would make a difference if they didn't hold it against—

THE COURT: Let me ask you. Are you saying that the defendant who made admissions against interest now comes up with an alibi defense?

MR. GOLDENHERSH: There is no admission that they were involved in this together. Those are other little things. I don't know what they are going to prove, and I ask that they advise us what they are going to prove so that there would be an intelligent evaluation of it.

THE COURT: Did Hamilton tell you that he would do it?

MR. GOLDENHERSH: Well, I believe he indicated that he would come up with that, yes. So that there could be an intelligent evaluation of it.

THE COURT: Well, that would be unusual. It isn't required by our laws of Discovery, criminal Discovery.

MR. GOLDENHERSH: No, that's true.

MR. BARICEVIC: Judge, I deny that we—we have had discussions with Mr. Goldenhersh on that. I've had those

same discussions with Mr. Hamilton, and we have agreed that we will give Mr. Goldenhersh everything he is entitled to by the rules of Discovery, and nothing more.

MR. GOLDENHERSH: Yeah. All right. Well, but whether they have agreed to it or not, there has been no admissions by anybody that they have been engaged in this event. But there are a number of things throughout the Discovery which are clearly, which clearly could have been provable as admissions against interest against one of the defendants clearly inadmissible as to the other one, and an alibi.

THE COURT: Specify some of those instances, and I will rule on them.

MR. GOLDENHERSH: Well for example, they have not—they have got Lee Griffin—let me think of this for just a moment. They have got Griffin allegedly having made a phone call while he was in the police station telling a friend of his to report his car stolen. You know, I don't know if they are going to try to prove this kind of thing or not, but if they do try to prove it, the only basis of it could be an admission against interest, against Lee Griffin, and it wouldn't be applicable at all to Jimmy Smith. This is not a stolen car case, as I say, this is a Murder with an alibi defense.

Another example is that one of the policemen says that, "Boy, you're sure in a lot of trouble," and Griffin says, "I know it." Well that I assume could be provable against Griffin as an admission against interest, clearly no admissible as to the co-defendant Jimmy Smith. There are a few other examples like that, not direct, not relating directly to the alleged shooting, but a very very damaging, devastating evidence, perhaps as to the one defendant, and clearly inadmissible as to the other. In this alibi defense, it is very detrimental, devastating, and no way to cure it by Instruction, and that together with the fact that the

one guy has the substantial record and the other one has none whatsoever.

THE COURT: Well, the fact that he has a record, that wouldn't be grounds at all. It would be a matter of strategy on your part, whether you wish to put him on the stand or not.

MR. GOLDENHERSH: Right.

THE COURT: But it wouldn't be grounds for granting a severance merely because he had a record, otherwise he would be—we would be unable to try half the lawsuits we try.

MR. GOLDENHERSH: The bottom line is can they get a fair trial together. I don't think there is any way in the world they can.

THE COURT: I think they can, and I can assure you of this. I don't think any defendant has gone out of this court saying that the Court was derelict in its duty in seeing that they got a fair trial. I think the State has criticized me several times, to me they have been critical. I don't say they go out in the hallways—I don't know what they say out there, in out there I don't give a damn. In any event, they have been critical that I have given the defendant too much leeway. But I think a man is entitled to a fair trial and impartial trial. And he will certainly get it in here, and that wouldn't be grounds in my opinion for a severance. None of that has been considered by our Appellate and Supreme Courts, and we have, as you well know, our Appellate and Supreme Courts have been very protective of the rights of the defendants in the State of Illinois.

MR. GOLDENHERSH: Right.

THE COURT: No, if that's the grounds, and I guess those would be the grounds on each of those two defendants, on each of their motions to sever, would it not?

MR. GOLDENHERSH: Yes sir, basically they are the same.

THE COURT: Then I would deny your motions to sever. What I am particularly interested in, if there is some Discovery they haven't furnished you with, I want to know that.